a petition to review the validity of EPA's regulations, based on interpretation of the CAA. *See* 42 U.S.C. § 7607(b). As New Jersey and other states explain in their amicus brief, in this enforcement action, the Fourth Circuit's opinion exceeded the jurisdictional limits of § 7607(b).

The Fourth Circuit justified this overreach by a clearly erroneous interpretation of applicable EPA regulations. At issue is the meaning of the term "modification," as used in the CAA's PSD provisions[3] – specifically, whether that term includes projects that, though they do not result in any increase in the *hourly rate* of emissions during operation, will result in increases in the *hours of operation* of a plant. EPA has adopted regulations that directly address this interpretive question; they clearly provide that a project that increases a unit's hours of operation but not its maximum hourly rate of emissions may still be a "modification" for PSD purposes where it will lead to increased annual emissions. The Fourth Circuit, in holding that such a project is not a "modification," mandated use of a distinct test set forth in EPA's regulations governing a different regulatory program, the New Source Performance Standards ("NSPS"). That test ignores any increases in hours of operation and considers only an increase in the maximum hourly rate of emissions during operations. (EPA refers to this test as an "hourly potential emissions" test.) In mandating this test for purposes of the PSD program, the court effectively — and improperly— invalidated EPA's interpretation of the CAA in its PSD regulations, a course only open to the D.C. Circuit.

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3. The PSD provisions of the CAA, 42 U.S.C. §§ 7470-92, cover areas that have already attained the National Ambient Air Quality Standards ("NAAQS"). Although only the PSD requirements are at issue in this case, the Fourth Circuit's decision also applies to areas that have not yet attained the NAAQS, subject to the nonattainment New Source Review ("NNSR") provisions of the CAA, 42 U.S.C. § 7503. The PSD and nonattainment NSR programs are together referred to as the New Source Review ("NSR") Program.

The Fourth Circuit, recognizing that it lacked jurisdiction to invalidate the PSD regulations, protested that its adoption of an hourly potential emissions test was "not an invalidation of those regulations." *Duke*, 411 F.3d at 549 n. 7. In a conclusory analysis that does not address, let alone analyze, the language of the PSD regulations and is relegated to a footnote, the court justified this assertion by holding that those regulations "can" be interpreted consistently with an hourly potential emissions test. *Id.* That conclusion flies in the face of the plain language of the PSD regulations, which, on their face, require an increase in actual annual emissions. Under the regulations, as common sense would suggest, actual annual emissions may increase either because of an increase in the hourly rate of emissions during operation *or* because of an increase in the hours of operation. Moreover, the PSD regulations' focus on actual annual emissions reflected a deliberate decision by EPA, when it revised its PSD regulations, to abandon a potential emissions test virtually identical to the emissions test under the NSPS regulations. In the course of notice-and-comment rulemaking, EPA explicitly concluded that such a potential emissions test should not be used for the PSD program.

Because the plain language of the PSD regulations mandates an actual annual emissions test, thus foreclosing the Fourth Circuit's preferred hourly potential emissions test, the court was required to end its analysis there; no direct analysis of the CAA was necessary. Even if it had been proper, though, for the court to look beyond the plain text of the PSD regulations, EPA's application of the PSD regulations below is consistent with the relevant statutory language and congressional intent. The hourly potential emissions test that the lower court adopted is a test designed to determine whether there will be a change in the emissions that would potentially be emitted if a plant operated at maximum emissions capacity. The test looks only at the theoretical maximum rate of emissions during operation; it ignores hours of operation. But this is contrary to the statutory definition of "modification" under 42 U.S.C. § 7411(a)(4), as

incorporated in the PSD provisions. The CAA is clear that PSD requirements are triggered by physical changes resulting in increases in "actual" emissions of a source, as opposed to "potential" emissions. *See New York v. EPA* ("*New York I*"), 413 F.3d 3, 19-20, 39-40 (D.C. Cir. 2005). Furthermore, in enacting the PSD provisions of the CAA in 1977, Congress clearly expressed its concern with *actual annual* emissions increases, not changes in *hourly potential* emissions.

ARGUMENT

I. The Plain Language Of The PSD Regulations Requires Increases In Actual Annual Emissions, Not Hourly Potential Emissions.

In this EPA enforcement action, the Fourth Circuit has jurisdiction to determine only whether EPA is properly interpreting and applying the applicable PSD regulations. As explained by petitioners, 42 U.S.C. § 7607(b) grants the D.C. Circuit exclusive jurisdiction over any challenge to EPA's interpretation of the CAA in its regulations, and thus the validity of those regulations.[4] Despite this jurisdictional limitation, the Fourth Circuit found the hourly potential emissions test applicable to Duke's projects based on its analysis of the language and legislative history of the CAA and conclusion that Congress had mandated that the emissions tests under the NSPS and PSD regulatory programs *must* be the same. *Duke*, 411 F.3d at 546-51. The court's exercise of jurisdiction to interpret the

4. To the extent that EPA regulations interpreting the CAA "could have been" challenged in the D.C. Circuit, such regulations "shall not be subject to judicial review in civil or criminal proceedings for enforcement." 42 U.S.C. § 7607(b)(2); *see also Wis. Elec. Power Co. v. Reilly* ("*WEPCo*"), 893 F.2d 901, 914, n. 6 (7th Cir. 1990) (review limited by § 7607(b)(1) to "whether the EPA properly applied [the] regulations" at issue); *United States v. Ethyl Corp.*, 761 F.2d 1153, 1157 (5th Cir. 1985) ("section 307(b)'s clear language and Congress's manifest intent [was] to avoid protracted and inconsistent adjudications over the validity" of nationally applicable CAA regulations), *cert. denied*, 474 U.S. 1070 (1986).

CAA was premised on its assumption that the PSD regulations "can" be interpreted to institute a test based solely on hourly potential emissions. Based on that premise, the court concluded that its decision was "not an invalidation of those regulations." *Id.* at 548 n. 7.

In support of this critical determination that the PSD regulations can be interpreted to direct an hourly potential emissions test, the Fourth Circuit conducted no analysis of the language of those regulations or the history of their adoption. An evaluation of these issues demonstrates that the court's interpretation cannot stand, and that EPA's interpretation and application of its regulations is correct.

A. The PSD Regulatory Emissions Test Cannot Be Interpreted As An Hourly Potential Emissions Test.

The enforcement action in *United States v. Ohio Edison, Co.*, 278 F. Supp. 2d 829 (S.D. Ohio 2003), provides a vivid illustration of how a power plant project that increases hours of operation may substantially increase the plant's actual annual emissions, even if the project does not increase its hourly emissions capability. The defendant in that case undertook boiler component replacements – similar to those at issue below – to increase the hours of operation of the units. *Id.* at 858. Persistent boiler tube leaks at one such unit caused it to be shut-down a total of 2,134 hours per year. The court found that replacing the failed boiler components triggered PSD permitting requirements because the increased hours of operation projected by the defendant to result from the replacement would yield 5,200 tons per year of increased SO_2 emissions, *id.* at 869-70,[5] which is

5. Similarly, the D.C. Circuit, using the facts in *Puerto Rican Cement Co. v. EPA*, 889 F.2d 292 (1st Cir. 1989), has aptly illustrated this point:

> In that case, a factory sought to . . . replace old cement kilns that operated 60% of the time with a new kiln that would emit fewer pollutants per hour. . . . Under the

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well above the 40 ton per year emissions increase threshold, *see* 40 C.F.R. § 51.166(b)(23)(i). The boiler component replacements at issue here, like those in *Ohio Edison*, were intended to increase the future hours of operation of the plants without increasing their hourly emission rate, *Duke*, 411 F.3d at 544, resulting in projected increases of actual annual emissions. As explained below, the PSD regulations clearly reach such increases.

1. Unlike the NSPS Regulations, the 1980 PSD Regulations Require Emissions Increases to Be Based on Changes in Actual Annual Emissions.

As other courts have correctly held, the plain language of the 1980 regulations, as well as the context in which they were adopted, directly contradicts the Fourth Circuit's determination that the PSD regulations can and must be "interpreted" to require an hourly potential test. First, the PSD regulations, by their plain language, require a finding of an increase in actual annual emissions, whether because of an increase in hours of operation or because of an increase in the hourly rate of emissions during operation. The PSD pre-construction requirements apply, *inter alia*, to "any major modification" which, in turn, is defined as a physical change that "would result in a significant net emissions increase. . . ." 40 C.F.R. § 51.166(b)(2)(i), (i)(2), (j)(3). The definition of "net emissions increase" denotes the positive sum of any increase in "actual emissions" at the unit resulting from the physical or operational change and any other

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> interpretation urged by industry petitioners, . . . the company had not undergone an 'increase' in emissions – and thus would not trigger NSR – since the kiln would have a lower hourly emissions rate than the old ones. Siding with EPA, the First Circuit agreed that the company had to obtain an NSR permit to make the intended change [because of the projected increase in annual emissions resulting from the change].

New York I, 413 F.3d at 15.

contemporaneous decreases or increases in "actual emissions" at other units within the source. *Id.* § 51.166(b)(3). The regulations make clear that actual emissions are measured on an *annual*, not *hourly*, basis. For the pre-change baseline period, the regulations define "actual emissions" to mean "the average rate, *in tons per year*, at which the unit *actually emitted* the pollutant." *Id.* § 51.166(b)(21)(ii) (emphasis added). Likewise, the calculation of post-change emissions is also based on "the actual rate of emissions from the unit."[6] *Id.* § 51.166(b)(21)(i). If the net emissions increase is positive, the next step is to determine if the emissions increase is "significant," defined under the regulations as "a rate of emissions that would equal or exceed" different thresholds of pollutant emissions, once again measured in "tons per year." *Id.* § 51.166(b)(23)(i).

The language of the PSD regulations contrasts starkly with the language of the NSPS regulations. The NSPS emissions test does not measure either actual *or* annual emissions increases. The regulatory term "modification," which triggers the NSPS requirements, is defined in terms of an increase in an "emission rate," *id.* § 60.14(a), measured in kilograms of pollutant emitted per hour at maximum unit capacity, as specified in § 60.14(b)(2).[7] The NSPS emissions test is thus a paper and

6. Under 40 C.F.R. § 51.166(b)(21)(iv) (1987), "[f]or any emissions unit which has not begun normal source operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date." Thus conversely, where the unit *has* begun normal operations at the time of the physical or operational change, the unit's potential to emit *cannot* be used. *See* 56 Fed. Reg. 27,630, 27,633/1 (June 14, 1991) ("linchpin . . . for predicting future emissions after a modification is thus whether the unit has 'begun normal operations'"). Under these circumstances, § 51.166(b)(21)(i) (1987) – which defines "actual emissions" – is applicable. *See WEPCo*, 893 F.2d at 917 (finding post-change emissions for unit that *has* begun normal operations based on "realistic assessment of [a change's] impact on ambient air quality levels") (internal quotation marks omitted).

7. This brief references the 1975 NSPS regulations, which first employed the hourly potential emissions test.

pencil exercise that computes changes in hypothetical hourly emissions at maximum unit capacity – *regardless* of whether the unit was ever actually operated at that capacity, with both the historical and projected utilization of the unit irrelevant. Accordingly, EPA has consistently described the NSPS emissions test as a calculation of changes in *hourly potential* emissions: "[P]ursuant to longstanding EPA interpretations, the emission rate before and after a physical change is evaluated at each unit by comparing the *hourly potential* emissions under current maximum capacity to emissions at maximum capacity after the change." Joint Appendix ("J.A.") 259 (Applicability of PSD and NSPS Requirements to WEPCO Life Extension Project, Sept. 9, 1988, p. 9) (emphasis added); *see also WEPCo*, 893 F.2d at 913 ("EPA compares the *hourly emissions* of the unit at its current maximum capacity to its *potential* emissions at maximum capacity after the change" (emphasis added)); *Requirements for Preparation, Adoption and Submittal of Implementation Plans*, 57 Fed. Reg. 32,314, 32,330/2 (EPA July 21, 1992) ("Under current regulations, the emissions rate before and after a physical or operational change is evaluated at each unit by comparing the current hourly potential emissions at maximum operating capacity to hourly emissions at maximum capacity after the change.").[8]

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8. Even the regulated industry understood that a modification can occur under the PSD regulations absent an increase in hourly emissions capacity. In their original challenge to the 1980 PSD regulations, industry petitioners interpreted the regulations in the same manner as EPA does here, stating that (i) the regulations "provide that a modification occurs whenever a series of contemporaneous changes at a source result in a significant increase in *actual* emissions, even though the source's net *capacity* to emit remains constant or declines," and (ii) the "question of whether there is a net increase in actual emissions requires that variations in the source's hours and rates of operation be taken into account." *See* Brief for Industry Petitioners at 5-6, 28-29, *Chem. Mfrs. Ass'n v. EPA*, No. 79-1112 (D.C. Circ. Feb. 12, 1981); *New York I*, 413 F.3d at 14-15 (original challenge to 1980 PSD

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Second, the Fourth Circuit's assumption that the NSPS and PSD regulatory emissions tests "can" be read identically disregards the circumstances of EPA's adoption of the actual annual emissions test under the 1980 PSD regulations, demonstrating that EPA intended and understood the PSD test to be different from the NSPS hourly potential test. Significantly, when EPA adopted the actual annual emissions test, it abandoned a capacity-based test, similar to the NSPS emissions test, that it had used in an earlier version of the PSD program in effect between 1978-80. Unlike the 1980 regulations at issue here, the 1978 PSD regulations defined "major modification" as any physical or operational change "which increases the *potential emission rate* of any air pollutant regulated under the act" by either 100 or 250 tons per year (depending on source category). 43 Fed. Reg. 26,380, 26,403-04 (June 19, 1978) (emphasis added).[9] EPA defined "potential to emit" in the 1978 regulations as "the *capability at maximum capacity* to emit a pollutant in

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regulations stayed); *see also* Settlement Agreement, Ex. B at 1, *Chemical Mfrs. Ass'n v. EPA*, No. 79-1112 (D.C. Cir. Feb. 22, 1982) (settlement between industrial polluters, including Duke, and EPA, requiring EPA to propose changing PSD emissions test to allow emissions increases to be based on "source's potential to emit (as calculated in terms of pounds of pollutant emitted per hour)").

9. EPA interpreted "modification" in its 1974 PSD regulations to be "consistent with" the NSPS regulatory definition of that term. 39 Fed. Reg. 42,510, 42,513/1 (Dec. 5, 1974) (interpreting 40 C.F.R. § 52.01(d)). The NSPS definition in effect at that time, however, applied simply to "increases [in] the amount of any air pollutant," with *no* reference to hourly emission rates. 36 Fed. Reg. 15,704, 15,705/1 (Aug. 17, 1971); *Duke*, 411 F.3d at 542. The 1974 PSD regulatory definition of "modification" was subsequently superseded and made moot by the PSD emissions test adopted by EPA in 1978 to administer the 1977 CAA amendments. *Ala. Power Co. v. Costle*, 636 F.2d 323, 348 n. 24 (D.C. Cir. 1979); *see also Envtl. Defense Fund, Inc. v. EPA*, 898 F.2d 183, 184 n. 1 (D.C. Cir. 1990) (explaining history of PSD regulations' promulgation).

the absence of air pollution control equipment." *Id.* at 26,404/1 (emphasis added). In *Alabama Power*, however, the D.C. Circuit vacated that definition of "major modification" under the 1978 PSD regulations, 636 F.2d at 399-400, finding that the related PSD statutory definition of "major emitting facility" under 42 U.S.C. § 7479(1) requires the measurement of emissions to be based on "some measure of actual emissions." *Id.* at 353.

EPA promulgated the 1980 regulations "[i]n response to" *Alabama Power*. 45 Fed. Reg. 52,676/1 (Aug. 7, 1980). EPA re-examined the statutory definition of "modification" incorporated into the PSD provisions, finding that the words "'the *amount* of any air pollutant *emitted* by such source or which results in *the emissions* of any air pollutant not previously *emitted*'... appear to refer to what the source is actually emitting at a particular time." *Id.* at 52,700/2; *see also New York I*, 413 F.3d at 40 (EPA in "the preamble of the 1980 rule" interpreted § 7411(a)(4) to require that emissions increases be based on actual emissions). EPA also found *Alabama Power*'s discussion of the meaning of "major emitting facility" controlling in this respect, noting that the Court "used language which, like the section 111(a)(4) definition, suggest changes in actual emissions." 45 Fed. Reg. at 52,700/2. Thus, "[f]ollowing the lead" of *Alabama Power*, EPA "shifted the focus of its regulatory definitions from" a capacity-based, potential emissions test, similar to the test the Fourth Circuit decision requires, to the test based on actual annual emissions that is now reflected in the plain language of the PSD regulations. *Id.* at 52,700/3. Because, for purposes of the PSD program, EPA explicitly rejected a potential emissions test like the one used for the NSPS program in favor of an actual annual emissions approach, the PSD regulations cannot be interpreted to provide for an hourly potential test. *Cf. County of Los Angeles v. Shalala*, 192 F.3d 1005, 1014 n. 2 (D.C. Cir. 1999) ("adding and deleting certain words" gives amended provision "different meaning from its predecessor provision"), *cert. denied*, 530 U.S. 1204 (2000); *DIRECTV, Inc. v. Brown*, 371 F.3d 814, 817 (11th Cir. 2004)

("[w]here the words of a later statute differ from those of a previous one on the same or related subject, then Congress must have intended them to have a different meaning" (quoting *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1444 (D.C. Cir. 1988))).

Accordingly, the Fourth Circuit stands alone as the only circuit court to find that the NSPS and PSD emissions tests must or even can be interpreted identically. In *New York I*, Duke and other industry petitioners argued that "the 1980 regulation provided that an emissions 'increase' occurs only if the maximum hourly emissions rate goes up as a result of the physical or operational change." 413 F.3d at 15. Noting that Duke's test could only be instituted if the existing PSD regulations were invalidated, the D.C. Circuit rejected industry's contention that EPA must and can interpret the 1980 PSD regulations so that only a project that increases a plant's hourly emissions at maximum unit capacity constitutes a modification. *See id.* at 19-20.[10] *See also New York v. EPA* ("*New York II*"), 443 F.3d 880, 889 (D.C. Cir. 2006) (rejecting industry's "rel[iance] on NSPS regime to reargue their position that 'modifications' [under PSD] require an increase in maximum emission rates"); *WEPCo*, 893 F.2d at 913, 915 (finding that NSPS and PSD regulations "measure[] emissions in a fundamentally distinct manner," with the NSPS test "concerned primarily with . . . emissions rates, expressed in kilograms per hour," and the PSD test "concerned with changes in total annual emissions, expressed in tons per year"); *Puerto Rican Cement*, 889 F.2d at 298 (PSD requirements triggered by change allowing plant to operate more hours even though hourly emissions

10. The D.C. Circuit's decision carries special weight in these matters because it has exclusive jurisdiction to review EPA's "nationally applicable" air pollution regulations. 42 U.S.C. § 7607(b)(1). Moreover, no party has petitioned this Court for certiorari in *New York I*, meaning that the validity of the emissions test under the 1980 PSD regulations can no longer be questioned.

remain unchanged or reduced).[11] The other circuits have correctly interpreted the PSD regulations.

2. The Fourth Circuit's Conclusion that the NSPS and PSD Regulations Regarding Modifications Must Be Interpreted Identically Ignores Numerous Differences Between the Two Regulatory Programs.

Any attempt to read the NSPS and PSD regulations as consistent would require papering over of numerous obvious differences between the two programs. One important difference between the two emissions tests, for example, is that the PSD test allows netting (or "bubbling") of emissions increases and decreases across units within a source in determining whether the modification requirements are triggered, while the NSPS test does not allow such netting. *Compare* 40 C.F.R. § 51.166(b)(2)(i), (3) ("major modification" defined in terms of change resulting in "net emissions increase"), *with id.* § 60.14(a) ("modification" defined in terms of change resulting in "increase in the emission rate" at unit only). As explained in *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 840, 860 (1984) (in nonattainment New Source Review, or "NNSR," context) and *Alabama Power*, 636 F.2d at 400-401 (in PSD context), EPA based these divergent approaches on different interpretations of the single statutory definition of "stationary source," under 42 U.S.C. § 7411(a)(3), which is a component term of the statutory definition of "modification," *id* § 7411(a)(4) ("term 'modification' means any physical change in . . . a *stationary source* which increases the amount of any air

11. In *Puerto Rican Cement*, EPA compared " the *actual* historical amount of pollutants that Kilns 3 and 6 emitted . . . with the amount of pollutants that the [single] converted kiln would be *capable* of emitting in the future." 889 F.2d at 296 (emphasis added). The First Circuit upheld EPA's application of the actual-to-potential emissions test there based on its finding that the converted kiln at issue constituted a "new" emissions unit that had *not* begun normal operations. *Id.* at 292, 296-97; *see also WEPCo*, 893 F.2d at 917 n.12 (distinguishing *Puerto Rican Cement* on this basis).

pollutant emitted by such source . . .") (emphasis added). EPA applied these different interpretations of "stationary source" to distinguish "between the technology-based provisions of NSPS and the air quality-based provisions of [PSD]." *See* 57 Fed. Reg. at 32,316/1.

At the time the PSD regulations at issue here were adopted in 1980, there were at least three other key differences between the two programs: (1) While the PSD regulations require examination of a representative two-year period in determining how the emissions baseline is measured, the NSPS baseline is based on the maximum achievable emission rate immediately preceding the change; (2) While the PSD emissions test requires an increase above an annual "significan[ce]" threshold, NSPS requirements are triggered by any increase in maximum achievable emissions; and (3) The NSPS, but not PSD, regulations exempt pollution control projects from the modification requirements.[12] *See* 40 C.F.R. § 51.166(b)(2)(i), (21)(ii), (23); 40 C.F.R. § 60.14(e)(5), (h); *WEPCo*, 893 F.2d at 914-15.

Additionally, the Fourth Circuit finding that EPA can and must adopt identical NSPS and PSD definitions of "modification" is both flatly inconsistent with and unworkable in light of the decisions of this Court in *Chevron* and the D.C. Circuit in *Alabama Power*, both of which approve an approach to modifications under NNSR and PSD that differs from that used in the NSPS program. Those decisions upheld EPA's interpretation of "stationary source" to allow for netting in determining whether a source has been modified under NSR but not under NSPS. *See Chevron*, 467 U.S. at 863-64 (allowing netting in determining what is a modification under NNSR programs, stating that "agency primarily responsible for administering this important legislation has consistently interpreted it flexibly – not in a sterile textual vacuum, but in

12. EPA's pollution control project exclusion in the 2002 PSD rule changes was vacated by the D.C. Circuit as being beyond EPA's authority. *New York I*, 413 F.3d at 40-42.

the context of implementing policy decisions in a technical and complex arena"); *Alabama Power*, 636 F.2d at 402 ("bubble concept would be contrary to the intent of the NSPS provisions, but such is clearly not the case with regard to the PSD provisions"); *see also ASARCO Inc. v. EPA*, 578 F.2d 319 (D.C. Cir. 1978) (prohibiting netting under NSPS program). Indeed, the holding in *Alabama Power* was also based on "two possible ways to construe the term 'increases'" – one of the component terms of § 7411(a)(4) at issue here; one that allows for netting and one that does not. 636 F.2d at 401.[13]

Thus, under *Chevron*, a power plant unit is not considered to be modified under PSD and NNSR if actual annual emission increases resulting from a physical change at the unit are offset by emission decreases elsewhere at the plant, but the same unit may still be considered modified under NSPS (where netting is unavailable) if the unit increases its potential-to-emit. While *Chevron* and *Alabama Power* authorize EPA to interpret "modification" to allow for netting under PSD but not NSPS to implement the different purposes of the programs, the Fourth Circuit's decision now requires EPA to interpret "modification" identically under the two programs. The Fourth Circuit's holding directly conflicts with the holdings in *Chevron* and *Alabama Power*.

B. The Other Arguments Relied Upon By the Fourth Circuit are Erroneous.

The Fourth Circuit failed to explain how the PSD regulations could be construed identically with the NSPS regulations, despite the clear differences between them. Instead, relegating its entire analysis of the meaning of the regulations to a partial sentence in a footnote, the Fourth Circuit explained that "the PSD regulations can be interpreted consistently with

13. Of course, as discussed *infra*, pp. 22-24, as used in the PSD context, the phrase "increases the amount of any air pollutant emitted by such source," § 7411(a)(4), must be interpreted as requiring "actual," as opposed to "potential," emission increases.

pre-existing principles – the NSPS regulations – as the district court demonstrated and as EPA's Director of the Division of Stationary Source Enforcement twice opined shortly after promulgation of the PSD regulations." *See* 411 F.3d at 549 n. 7. However, the arguments set forth in the district court's decision provide no basis for this construction of the PSD regulation.

First, the notion that Congress incorporated the NSPS regulatory definition of "modification" into the PSD provisions when it amended the CAA in 1977, *see United States v. Duke Energy Corp.*, 278 F. Supp.2d 619, 629 (M.D.N.C. 2003), is erroneous. This issue bears on the validity of the 1980 PSD regulations, not their interpretation, and thus under 42 U.S.C. § 7607(b)(2) could only have been, and indeed was, raised in the D.C. Circuit in *New York I*. Moreover, as the D.C. Circuit correctly found in *New York I*, there are no "indications in the statutory language or history to infer that Congress intended to incorporate" the NSPS regulatory definition of "modification" into the PSD provisions. 413 F.3d at 19-20; *see also Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991) ("administrative interpretation of statute" not incorporated into reenacted statute where "[t]here is no indication that Congress was aware of administrative construction"); *cf. Bragdon v. Abbott*, 524 U.S. 624, 632 (1998) (finding statutory incorporation of regulation where Congress "adopted a specific statutory provision" that expressly adopted an existing regulatory provision); *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 437 (1986) (finding FDIC regulation defining statutory term "deposit" incorporated into reenacted statute where regulation had been in existence for 50 years and Congress had "expressly designed to incorporate the FDIC's rules and regulations on 'deposits'").

Second, the exemption for increases in hours of operation from what constitutes a physical change, 40 C.F.R. § 51.166(b)(2)(iii)(f), in no way precludes EPA from considering increases in hours of operation in calculating emissions increases attributable to a physical change. *See Duke*, 278 F. Supp.2d at 641. By its terms, § 51.166(b)(2)(iii)(f) only precludes EPA from

finding that an "increase in the hours of operation" alone constitutes a physical change; it has no application, however, to situations where – as in this case – there is a physical change such as a power plant renovation that enables a source to operate more hours. As explained in *WEPCo*, EPA recognized in the preamble to the 1980 PSD rules that the "hours of operation" exemption was "provided to allow facilities to take advantage of fluctuating market conditions, not construction or modification activity." 893 F.2d at 916 n. 11 (citing 45 Fed. Reg. at 52,704/2). Thus, EPA's contemporaneous interpretation of the "hours of operation" exemption is that, while an increase in such hours by itself does not constitute a "modification," the exemption does not apply to actual construction that allows a source to increase its hours of operation. Accordingly, *WEPCo* found that "EPA's refusal to apply '[this] production rate/hours of operation' exclusion was proper" because the exclusion did not cover the "modification" activity at issue in the case.[14] *Id.*; *see also Puerto Rican Cement*, 889 F.2d at 298 ("hours of operation" exemption inapplicable to determining emission increase attributable to physical change).

Third, the statements of a single agency employee made in a letter to an industry source and in an internal memorandum cannot support an interpretation of the PSD regulation as requiring application of the NSPS-hourly emissions test. *See* 411 F.3d at 549 n. 7; *see also Duke*, 278 F. Supp.2d at 641.[15]

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14. *WEPCo* does not require PSD emissions increases to be based on changes in "the maximum hourly rate of emissions." *Cf.* 278 F. Supp.2d at 644-45. *WEPCo* holds that the NSPS and PSD programs "measure[] emissions in a fundamentally distinct manner" and that EPA may consider increased hours of operation in determining whether a physical change will increase emissions, *see* 893 F.2d at 913, 916 n. 11.

15. It is far from clear that the documents cited by the district court, and thus implicitly relied upon by the Fourth Circuit, actually support this proposition. For example, the district court misconstrued a January 22, 1981 memorandum for a finding that "increased hours of

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This conclusion is flatly inconsistent with the regulations' plain language, EPA's express abandonment of a potential emissions test in the 1980 regulations, and EPA's contemporaneous interpretation as set forth in the regulatory preamble. *See Cinergy*, 384 F. Supp.2d at 1278 (memoranda "are contrary to the plain language of the CAA and EPA's regulations"); *Ohio Edison*, 276 F. Supp.2d at 877 (reliance on memoranda "is misplaced because they are contrary to the plain language of [CAA]"); *cf. Puerto Rican Cement*, 889 F.2d at 298 (rejecting similar argument where "EPA materials written both before, and after, the deviant letter are consistent with [EPA's] present interpretation").

Reliance on these memoranda is also contrary to EPA's consistent interpretation of the 1980 PSD regulations as requiring an actual annual emissions test that considers increases in hours of operation attributable to a physical change. Indeed, as discussed *supra* at 10-11 n. 8, at the time the two documents were written, EPA was defending against an industry lawsuit, challenging the regulations on the grounds that they *did not* include a maximum hourly rate test and had entered into a settlement agreement requiring it to propose changing the PSD

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operation, even when coupled with a physical or operational change, would not be considered a modification." *Duke*, 278 F. Supp.2d at 641-42. The actual memorandum, however, considered whether a plant converting to a new fuel must undergo PSD permitting, with EPA's determination that the "fuel switch" was exempt from being a "physical change" under 40 C.F.R. § 51.166(b)(2)(iii)(e). *See Ohio Edison*, 276 F. Supp.2d at 877. Thus, as the court in *Ohio Edison* explained, absent a physical change, the source was allowed to increase hours of operation without triggering PSD requirements. *Id.* Additionally, the court recited a June 24, 1981 applicability letter as follows: "'PSD applicability . . . is determined by evaluating any change in the [hourly] emissions rates caused by' the physical or operational change being examined." *Duke*, 278 F. Supp.2d at 641. Notably, the word "hourly" is not in the text (*see* JA28), and the specified emission rate can alternatively refer to the annual rate required under PSD.

rules back to the pre-1980 approach. *See also* J.A. 255 (Applicability of PSD to the WEPCO Life Extension Project, Sept. 9, 1988, p. 6 ("exclusion for increases in hours of operation . . . does not take the project beyond the reach of PSD coverage if those increases do not stand alone but rather are associated with non-excluded physical or operational changes")); Letter from EPA to Ohio Edison (Jan. 1990) ("post-demonstration emissions increase attributable solely to an increase in the hours of operation . . . of the unit" does not trigger PSD "to extent that the emissions increase did not result from a physical or operation change"), *quoted in Ohio Edison*, 276 F. Supp.2d at 876; 57 Fed. Reg. at 32,328/1 ("increase in emissions attributable to an increase in hours of operation or production rate which is the result of a construction-related activity is not excluded from review"); 61 Fed. Reg. 38, 250, 38,269/2 (July 23, 1996) (expressing concern with industry request to *change* test to one based on increases in hourly emissions as allowing source "owner to use the [operating unit] at much higher levels (*e.g.*, more hours per day or week) than it had in the past" and thus "increase . . . utilization even though hourly potential emissions remain the same.").

Moreover, as a matter of law, a single agency official cannot change the plain meaning and EPA's contemporaneous interpretation of the 1980 PSD regulations absent notice-and-comment rulemaking required to make such a change. *See Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997) ("Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking."), *cert. denied sub nom.*, *Pollin v. Paralyzed Veterans of Am.*, 523 U.S. 1003 (1998). The States are in charge of implementing the PSD program through their SIPs and rely in this regard on the language of EPA's regulations and official agency statements made in rulemaking documents; they simply cannot be bound by a "secret" agency "law" memorialized in a letter to a single industry source or in

an EPA internal memorandum. *See Train v. NRDC*, 421 U.S. 60, 87 (1975) (deferring to EPA's official interpretation of statute where "there has undoubtedly been reliance upon its interpretation by the States").

Finally, there are post-1992 claims at issue in this case and no analysis that the Fourth Circuit has relied upon can establish that the applicable 1992 PSD regulations direct an hourly potential emissions test. There is simply no way that anyone could have come away from EPA's 1992 rulemaking proceeding believing that the PSD and NSPS emissions tests could be interpreted identically. EPA reiterated in the regulatory preamble that, with respect to determining emissions increases, (i) "the applicable [NSPS and PSD] rules branch apart," with "[e]missions increases for NSPS purposes . . . determined by changes in the hourly emissions rates at maximum physical capacity" and emissions increases under PSD determined by changes in "total emissions to the atmosphere . . . expressed in tons per year," and (ii) "an increase in emissions attributable to an increase in hours of operation or production rate which is the result of a construction-related activity is not excluded from review (see *WEPCo*, 893 F.2d at 916 n. 11; *Puerto Rican Cement*, 889 F.2d at 298)." 57 Fed. Reg. at 32,316/1, 32,328/1. EPA also specified that power plant operators are required to consider increases in utilization in performing an emissions increase analysis. *See* 40 C.F.R. § 51.166(b)(33) ("representative actual annual emissions" defined as "average rate, in tons per year, at which the source is projected to emit a pollutant . . ., considering the effect any such change will have on increasing or decreasing the hourly emissions rate and *on projected capacity utilization*" (emphasis added)).[16]

16. The district court found erroneously that Duke "opted out" of the 1992 regulatory requirements "by failing to satisfy the regulatory prerequisite of submitting emissions data for a five-year period following the physical change." *Duke*, 278 F. Supp.2d at 647 n. 25. There is no provision in the regulations that allows Duke or any other utility to

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In sum, the Fourth Circuit ruling is inconsistent with the plain language of the 1980 PSD regulations, the context in which they were promulgated, including the EPA's contemporaneous interpretation, and EPA's consistent interpretation of the regulations for the last 26 years.

II. The PSD Regulations Requiring Emission Increases To Be Based On Changes In Actual Annual Emissions Effectuate Congressional Intent.

Contrary to the Fourth Circuit's erroneous conclusion, 411 F.3d at 548-51, the statutory language and legislative history of the CAA establish that the PSD regulatory emissions test correctly implements the plain language of the PSD provisions.

A. The Statutory Definition of "Modification" Requires Actual Emissions Increases.

The actual annual emissions test under the PSD regulations follows directly from the plain language of the statutory definition of modification as applied in the PSD context. Congress defined "modification" in the 1970 CAA amendments as:

> [A]ny physical change in, or change in the method of operation of, a stationary source *which increases the amount of any air pollutant emitted* by such source or which results in the emission of any air pollutant not previously emitted.

42 U.S.C. § 7411(a)(4) (emphasis added).

In *New York I*, the D.C. Circuit employed "traditional tools of statutory interpretation" in correctly finding "that the CAA unambiguously defines 'increases' [under § 7411(a)(4)] in terms

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opt out of regulatory requirements. Instead, as specified under § 51.166(b)(21)(iv) and (v), EPA may assume that a source owner that fails to meet the emissions record-keeping requirement of § 51.166(b)(33) was emitting at maximum capacity following the change. Despite this, EPA is applying the more lenient actual-to-projected-actual test in this case.

of 'actual emissions'" – not "potential" or "allowable" emissions. 413 F.3d at 39.[17] The court's ruling gave effect to the plain meaning of the term "emitted," which, without a modifying phrase such as "potentially," refers to pollution that a source has actually generated. *See* Webster's Third New International Dictionary 742 (3d ed. 1967) (defining "emit" as, *inter alia*, to "send out: discharge, release"). Similarly, the term "amount," as used in the statutory definition of modification, signifies Congress's concern with the actual quantity of pollutants emitted rather than with the source's emissions "rate" or "potential." *See New York I*, 413 F.3d at 40 ("phrase 'the *amount* of any air pollutant *emitted* by [the] source' plainly refers to actual emissions"). Thus, analysis of the ordinary meaning of these terms demonstrates that "increases [in] the amount of any air pollutant emitted" means increases in the actual emissions of the source, not some theoretical measure of changes in plant capacity.

This interpretation of the statutory definition of "modification" is compelling when examined in the context of the PSD provisions of the CAA considered as a whole. Indeed, the other uses of the terms "emitted" and "emission" in the latter part of the definition of "modification" also refer to actual emissions: ". . . or which results in the emission of any air pollutant not previously emitted." 42 U.S.C. § 7411(a)(4). This language would make no sense if "emitted" and "emission" referred to potential emissions; by using the term "previously" to characterize "emitted," Congress clearly was referring to actual emissions. Moreover, it is unlikely that Congress could have intended the single word "emitted" to have different meanings within the same sentence.

17. Applying this interpretation, the court vacated an exemption based on "clean unit" status under the 2002 NSR regulatory changes. This exemption would have allowed sources that installed pollution controls or instituted certain work practices to avoid PSD permitting for 10 years, even if the source undertook a physical change that significantly increased actual emissions during that time period. 413 F.3d at 38-40.

That Congress meant the term "emit" to refer to actual emissions is also demonstrated by Congress's "juxtaposition of the terms 'emit' and 'potential to emit,'" as part of the definition of "major emitting facility," 42 U.S.C. § 7479(1), which "indicates that when Congress enacted the NSR program in 1977, it was conscious of the distinction between actual and potential emissions." *New York I*, 413 F.3d at 39; *see also Alabama Power*, 636 F.2d at 353 (holding that the term "emit" in the definition of "major emitting facility," 42 U.S.C. § 7479(1), refers to "some measure of actual emissions" rather than potential emissions). Likewise, the juxtaposition of the terms "emission limitation" and "emitted" in the context of the definition of "best available control technology" under 42 U.S.C. § 7479(3), shows that Congress understood the difference between those terms, with the latter referring exclusively to "actual" emissions. *New York I*, 413 F.3d at 39. As the D.C. Circuit explained, "[i]f Congress had intended for 'increases' in emissions to be measured in terms of potential or allowable emissions, it would have added a reference to 'potential to emit' or 'emission limitations.' The absence of such a reference must be given effect." *Id.* at 40; *see also Alabama Power*, 636 F.2d at 354, 355 (legislative history of the 1977 CAA amendments indicates that "Congress was concerned with large industrial [] major *actual* emitters of air pollution" and "that only major sources of *actual* emissions would be covered by the PSD permit requirements" (emphasis added)).

Thus, the common understanding of "emitted" and Congress's use of that term under other PSD provisions supports an actual emissions test. Accordingly, the D.C. Circuit's reading of § 7411(a)(4) in *New York I*, requiring changes in "actual" emissions as the event that triggers modification, is the only natural reading of the statutory definition of "modification" in the context of the PSD provisions. *See Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004); *Bluewater Network v. EPA*, 370 F.3d 1, 13 (D.C. Cir. 2004).

B. The Actual Annual Emissions Test Under the PSD Regulations Furthers Congressional Emphasis on Actual Air Quality.

The actual annual emissions test under the PSD and NNSR regulations also plays an integral role in furthering Congressional intent to achieve and maintain levels of air quality that protect public health and welfare. *See, e.g.*, 42 U.S.C. § 7470(1). Prior to 1977, many areas of the country were failing to attain the NAAQS; for example, 78 areas still were not in compliance with the ozone standard. S. Rep. No. 101-228, at 10 (1989), *as reprinted in* 1990 U.S.C.C.A.N. 3385, 3396; *see also id.* at 11, *as reprinted in* 1990 U.S.C.C.A.N. at 3397 (even as of 1989, 150 million people were living in areas failing to meet NAAQS for one or more pollutants). As with later failures to meet CAA deadlines, the "paper demonstrations of attainment" in some SIPs bore "little relation to the likelihood of actual attainment" and, in conjunction with the NSPS and mobile source emissions controls required under the 1970 CAA amendments, failed to translate into sufficient emissions reductions to achieve attainment. *Id.*, *as reprinted in* 1990 U.S.C.C.A.N. at 3397. Congress intended the 1977 amendments, which included the NSR provisions, to address the insufficient progress being made toward clean air. *See, e.g.*, SENATE ENV'T AND PUBLIC WORKS COMM., S. Rep. No. 95-127, at 12 (May 10, 1977) ("several thousand major industrial sources will not meet the deadlines of the act").

The NSR provisions added in 1977 reflect Congress's focus on actual air quality. In particular, the NSR provisions are concerned with maintaining (in the case of PSD) and improving (in the case of NNSR) actual air quality in areas where new or modified plants are located. The PSD provisions thus require a new or modified source to obtain a pre-construction permit, demonstrating that it will not cause a violation of an air quality "increment" (designed to prevent air quality from deteriorating significantly), as well as to install emission controls that represent BACT. 42 U.S.C. § 7475. The NNSR provisions

require a new or modified source to obtain a pre-construction permit, obtain emissions offsets so that total "actual" emissions in the nonattainment area are reduced when the source begins operation, and comply with the Lowest Achievable Emission Rate (LAER). *Id.* § 7503.[18] EPA's determination under NSR to treat actual annual emission increases as the triggering mechanism for "modifications" thus promotes Congressional intent to focus on protecting and improving actual air quality.

One of Congress's primary mechanisms for ensuring continued industrial development without harming air quality is the increment consumption analysis a new or modified source must undertake before obtaining a PSD permit. A new or modified source's emissions violate a region's "increment" if its projected pollutant emissions, when added to emissions increases and decreases at other sources in the same area, will exceed "maximum allowable" pollution above a "baseline concentration" level. *See id.* §§ 7473, 7475(a)(3)(A); 45 Fed. Reg. at 52,718/1-2. This analysis is based on the measurement of "actual" air quality conditions. The D.C. Circuit in *Alabama Power* found that the statutory definition of "baseline concentration," 42 U.S.C. § 7479(4), requires the measurement of "*actual* ambient pollution levels existing at the time of the first [PSD] permit application." 636 F.2d at 376 (emphasis added); *see also id.* ("baseline is to include all emissions *actually* being made by major facilities") (emphasis added).[19] Consistent with the statutory language, EPA decided in its 1980 PSD

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18. Non-attainment SIPs must include "a comprehensive, accurate, current inventory of *actual* emissions from all sources." 42 U.S.C. § 7502(c)(3) (emphasis added).

19. An earlier version of the House Bill premised the calculation of the "baseline concentration" of pollutants on "plant capacity in existence." HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, Report 95-295, at 397 (to accompany H.R. 6161, 95th Cong. 1st Sess. 397) (May 12, 1977). However, as noted in *Alabama Power*, the House Bill's reference to plant capacity was deleted from the enacted version of the 1977 CAA amendments. *See* 636 F.2d at 380-81.

regulations to use "actual source emissions" in determining the baseline concentration in order to "reflect actual air quality in an area." 45 Fed. Reg. at 52,714/2-3, 52,718/1.

In adopting the 1980 regulations, EPA followed the same "actual emissions" approach to determining the amount of allowable increment that remains available to a proposed major source or modification: "[T]he most reasonable approach, consistent with the statute, is to use actual source emissions . . . to calculate increment consumption or expansion." 45 Fed. Reg. at 52,718/1. In so finding, EPA explained that "[i]ncrement calculations based on the best prediction of actual emissions links PSD permitting more closely to actual air quality deterioration than calculations of allowable 'paper' emissions." *Id.* EPA emphasized the need to maintain consistency with the actual emissions test for modifications: "[U]se of actual emissions for increment consumption is consistent with using an actual emissions baseline for defining a major modification." *Id.*[20]

The NSR regulatory emissions trigger for modifications is also consistent with the statutory focus on annual emissions as the basis for NSR applicability. For example, the PSD requirements apply to "major emitting facilities," defined in terms of sources that emit pollutants above a threshold measured in "tons per year." 42 U.S.C. §§ 7475, 7479(1). For power plants, the PSD requirements govern all new sources with emissions above 100 tons per year. *Id.* § 7479(1). Similarly, 42 U.S.C. § 7475(b) provides an exception to one of the PSD pre-construction requirements that is applicable ". . . in the case of an expansion or modification of a major emitting facility . . . whose allowable emissions of air pollutants . . will be less than

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20. A new or modified source in an attainment area is also required to undertake "an analysis . . . of the ambient air quality at the proposed site . . . for each pollutant subject to regulation under the Act which will be emitted from such facility." 42 U.S.C. § 7475(e). The court in *Alabama Power* found that Congress intended this requirement to ensure "a realistic projection of air quality." 636 F.2d at 372.

fifty *tons per year*." *Id.* § 7475(b) (emphasis added). Further, each of the PSD increments over the baseline concentration is based on an "*annual* geometric mean" concentration in addition to 24-hour and 3-hour maximum concentrations. *Id.* § 7473(b) (emphasis added). Finally, the requirement that non-attainment SIPs provide "reasonable further progress" toward attainment is based on "*annual* incremental reductions in emissions of the relevant air pollutant." *Id.* § 7501(1). These provisions provide strong evidence that Congress intended the NSR provisions to apply to physical changes that increase annual emissions of pollutants.

The actual annual emissions test also furthers Congress's intent to promote responsible industrial growth in a manner that prevents deterioration of air quality. Congress believed that subjecting existing sources to control requirements when they are modified would reduce the pollution burden of existing sources, furthering Congressional intent to allow continued industrial development without harming air quality. *See id.* § 7470(3) (Congressional intent "to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources"); HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, Report 95-295, at 133 (to accompany H.R. 6161, 95th Cong. 1st Sess. 133) (May 12, 1977) ("if each new or modified major source is located, constructed, and operated so as to minimize its impact on available clean air resources, then more and bigger plants will be able to locate in the same area without serious air quality degradation"). The Fourth Circuit decision undermines this careful economic/environmental balance established by Congress under PSD because it allows physical changes that increase actual annual emissions which, in turn, may consume the PSD increment and thereby limit room for economic growth. *See WEPCo*, 893 F.2d at 909 ("too restrictive interpretation of 'modification' might upset the economic-environmental balance" established under PSD).

In sum, Congress intended the PSD program to be built upon a structure of *actual annual* emissions, from measuring ambient pollution levels, to determining whether a source is "major" or triggers the "modification" requirements, to implementing the various mechanisms for ensuring compliance with the NAAQS. The Fourth Circuit's decision should therefore be reversed.

CONCLUSION

For the reasons set forth above and in the petition, the Court should reverse the Fourth Circuit decision.

Respectfully submitted,

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